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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THOMAS LOERA, Plaintiff and Respondent, v. CITY OF LOS ANGELES et al., Defendants and Appellants.	B143527 (Los Angeles County Super. Ct. No. BS059525)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dzintra I. Janavs, Judge. Affirmed.

James K. Hahn, City Attorney, Cecil Marr, Senior Assistant City Attorney, Jess J. Gonzalez, Supervising Deputy City Attorney, Gerald M. Sato and Wayne H. Song, Deputy City Attorneys, for Defendants and Appellants.

Fullerton, Hanna & Willis and Lawrence J. Hanna for Plaintiff and Respondent.

Plaintiff Thomas Loera, a former officer with the Los Angeles Police Department, was terminated without a board of rights hearing. The City of Los Angeles contends that Loera was a probationary employee and not entitled to one. On Loera's petition for writ of mandate, the trial court found in Loera's favor, setting aside the decision to terminate him and ordering a board of rights hearing. We conclude that the trial court was correct and therefore affirm.

I

BACKGROUND

On October 28, 1997, Loera was appointed to the position of police officer in the department. He had to serve a probationary period of 18 months, which ended on April 26, 1999. (See L.A. City Charter, § 109(c).)[1]

On April 20, 1999 — a week before completing probation — Loera was served with a "Notice of Termination or Suspension of Sworn Probationary Employee." The notice, signed by the chief of police, stated that Loera was being terminated for three reasons: (1) maintaining an inappropriate dating relationship with his training officer; (2) failing to immediately notify his commanding officer of the relationship; and (3) making false or misleading statements, while on duty, to an officer conducting an official investigation. The notice indicated that the termination was effective April 21, 1999, and also stated that "[t]his termination . . . is made pending any appeal to the Chief of Police."

On June 8, 1999, Loera received a "liberty interest" hearing, at which he admitted that he had had an improper relationship with his training officer and that he had not immediately notified his commanding officer of the relationship.

On June 23, 1999, the hearing officer issued a written decision, stating: "It is the recommendation of this Hearing Officer that the reason(s) previously set forth be upheld

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[1] We cite the charter in effect until June 30, 2000, because the pertinent events in this case occurred before the effective date of the new charter.

and that the officer be terminated from probation. [¶] I hereby . . . submit my recommendation and findings to the Chief of Police . . . ." By way of an order dated June 30, 1999, the chief of police removed Loera as a police officer pursuant to the decision of the hearing officer. The order stated that it was effective as of April 21, 1999.

Although Loera received a "liberty interest" hearing, he did not receive a full hearing, known as a board of rights hearing. (See L.A. City Charter, § 202; Gov. Code, § 3303 et seq.)[2]

On September 28, 1999, Loera filed a petition for a writ of mandate against the city and the chief of police (hereafter city), seeking reinstatement and back pay. Loera alleged that he had completed his probationary period at the time of termination and was therefore entitled to a board of rights hearing. The parties filed memoranda addressing the merits of the petition.

On May 25, 2000, the trial court heard argument and granted the petition, setting aside Loera's termination and ordering a board of rights hearing. On June 16, 2000, the trial court entered judgment to the same effect. The city filed a timely appeal.

II

DISCUSSION

The city argues that the petition should have been denied because (1) Loera was not entitled to a board of rights hearing, (2) Loera did not file a formal demand for reinstatement, and (3) the petition was not timely filed or verified.

Loera filed his petition under sections 1085 and 1094.5 of the Code of Civil Procedure. Under section 1085, "[a] writ of mandate may be issued by any court . . . to

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[2] Section 202(1) of the city charter states in part: "No tenured officer of the Department shall be suspended, demoted in rank, suspended and demoted in rank, removed, or otherwise separated from the service of the Department (other than by resignation), except for good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges assigned as cause or causes therefor after a full, fair, and impartial hearing before a Board of Rights . . . ."

any inferior . . . board . . . to compel the performance of an act which the law specially enjoins . . . or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled . . . ." (*Id.*, subd. (a).) Under section 1094.5, a writ may be issued for "the purpose of inquiring into the validity of any final administrative order or decision . . . ." (*Id.*, subd. (a).) We need not decide whether Loera's petition falls within one or both of these statutes. Our decision would be the same under either section.

A. Entitlement to Board of Rights Hearing

A police officer, while a probationary employee, is "'subject to removal at [the department's] pleasure'" (*Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340, 346), and can be terminated without cause (see *Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1361). An employee on probation may be terminated without a hearing because the dismissal does not deprive the employee of a vested, or property, right. (*Lubey v. City and County of San Francisco*, *supra*, 98 Cal.App.3d at p. 345.) However, a liberty interest exists when the termination is based on a charge of misconduct that can stigmatize the employee's reputation or seriously impair his or her ability to earn a living. Under those circumstances, a terminated probationary employee has a right to a "liberty interest" hearing. (*Id*. at p. 346.)

The purpose of a "liberty interest" hearing affords the discharged officer "a limited right to establish a formal record of the circumstances surrounding his [or her] termination and to convince the employer to reverse its decision by demonstrating the falsity of the charges which led to the termination or through proof of mitigating factors." (*Riveros v. City of Los Angeles*, *supra*, 41 Cal.App.4th at p. 1361.) The chief of police is "free to disregard the outcome of the appeal hearing . . . ." (*Id*. at p. 1361, fn. 18.) "[T]hat power is consonant with the broad authority granted the chief in dealing with probationary officers. To hold otherwise would unduly restrict those powers." (*Id.* at p. 1362.)

In contrast, an officer who had completed the probationary period is tenured and can be terminated only for cause and only in accordance with specified procedures. Section 109(c) of the Los Angeles City Charter states in part: "At or before the expiration of the probationary period, the appointing authority of the department or office in which the candidate is employed may terminate him upon assigning in writing the reasons therefor to [the Board of Civil Service Commissioners (hereafter BCSC)]. Unless he is thus terminated during the probationary period his *appointment shall be deemed complete*." (Italics added.)

If written notice is not delivered or transmitted to the BCSC during the employee's probationary period, the termination is not effective. In that situation, the officer is deemed to be tenured and is entitled to a full hearing before the board of rights. (See *Zeron v. City of Los Angeles* (1998) 67 Cal.App.4th 639, 643–644, 645; see also *Riveros v. City of Los Angeles*, *supra*, 41 Cal.App.4th at p. 1352, fn. 6.)

In the present case, the notice of termination bears two dates with respect to its receipt by the BCSC.[3] The first date, April 22, 1999, came within Loera's probationary period and appears on the front of the notice. The second date, June 15, 1999, came after the probationary period and appears on the back side.

The city's personnel records supervisor, Veronica Vela, testified that city departments were supposed to send their termination papers to the personnel records unit, where they would be date-stamped and received for processing. However, the police department consistently refused to follow the proper procedure. A representative from the police department would come to the records unit, date-stamp the termination papers, and take them back to the police department. The personnel records unit did not actually see the papers until months later, when the police department brought them back and left them.

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[3] The documents actually use the term "personnel department," not BCSC. The parties agree that receipt by the personnel department constitutes receipt by the BCSC.

Vela stated that the April 22, 1999 stamp on Loera's notice of termination was the date on which the papers were brought to the records unit, date-stamped, and taken back to the police department. The second date, June 15, 1999, was the date on which the records were actually left with the records unit. Vela maintained a log book to record the dates on which termination papers were received by her unit. The log entry on Loera's termination initially showed the earlier date, but Vela changed it to June 15, 1999, the date on which the papers were delivered to the records unit for processing.

Vela's testimony was supported by section 9.421(c) of the personnel procedures manual, which covered the discharge of probationary employees. That section stated: "After all necessary signatures have been obtained, the personnel officer forwards the original of the [form] to the Personnel Department. This document should be time stamped and filed with the Personnel Department immediately, since the date it is received in the Personnel Department is the earliest effective date of the termination . . . ."

Similarly, on January 26, 1999, the general manager of the personnel department sent a memo to all departmental personnel officers, stating: "[I]t is crucial that any employee slated for probationary discharge be served with the written notice of his/her termination prior to the expiration of the applicable probationary period. Also important is the requirement that the appropriate notice be filed with the Civil Service Commission before the probationary period ends. Failure to execute either of these two mandatory steps in the process prior to the expiration of the probationary period will open the door to what could, likely, be a successful challenge to the termination." (Underscoring in original.)

Because Loera's notice of termination was not delivered or transmitted to the records unit until June 15, 1999 — after his probationary period had ended on April 26, 1999 — he was a tenured officer and entitled to a board of rights hearing.

B. Demand for Reinstatement

Section 112½ of the city charter states: "Whenever it is claimed by any person that he has been unlawfully suspended, laid off or discharged, and that such lay-off,

suspension or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged. Such demand for reinstatement must be filed with the Board of Civil Service Commissioners and such claim for compensation for such allegedly wrongful, illegal or erroneous discharge must be filed with the City Clerk. Failure to file such demand for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such a demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement. Proof of filing the claim for compensation within the time and in the manner herein specified shall be a condition precedent to any recovery of wages or salary claimed to be due on account of said lay-off, suspension or discharge."

In *Riveros v. City of Los Angeles*, *supra*, 41 Cal.App.4th 1342, Division Five of this court stated that "notice . . . made pursuant to charter section 112½ . . . governs the procedures for the termination of city employees who have passed their probationary period of employment." (*Id*. at p. 1348.) Here, Loera contends that he was a tenured officer and was therefore entitled to a board of rights hearing. Nevertheless, section 112½ is limited in scope; it does not apply to every discharge of a tenured police officer. (See *City of Los Angeles v. Superior Court* (*Burns*) (1973) 8 Cal.3d 723, 729–731.)

As explained in *Burns*: "[A]n examination of the purposes served by section 202[, which provides for a board of rights hearing,] and by section 112½ will show . . . that the latter section is superfluous. The purposes of section 112½ are twofold: (1) to insure administrative review of the cause of removal . . . ; and (2) to provide for a rehearing . . . . The first purpose, to insure administrative review, was met when the cause of [the officer's] removal was heard by a board of rights . . . . Further, any rehearing on the issue of his removal would be sought under . . . the same section. It appears, therefore, that the purposes of section 112½ are fulfilled whenever the procedure for removal of a police officer is invoked under section 202. To impose section 112½ as an additional

requirement would be merely duplicative." (*Burns, supra,* 8 Cal.3d at p. 731, citations and fn. omitted.) Consequently, because Loera was entitled to a board of rights hearing, he was not required to demand reinstatement under section 112½.

C. Alleged Defects in the Petition

The city contends that Loera filed his writ petition too late. By statute, the "petition shall be filed not later than the 90th day following the date on which the decision becomes final." (Code Civ. Proc., § 1094.6, subd. (b).) "If there is a provision for a written decision or written findings, the decision is final for purposes of this section upon the date it is mailed by first-class mail, postage prepaid, including a copy of the affidavit or certificate of mailing, to the party seeking the writ." (*Ibid*.) Further, if there is a provision for reconsideration, the decision is final on the date that reconsideration is denied. (*Ibid*.)

On June 30, 1999, after Loera's "liberty interest" hearing, the chief of police signed an order making the termination final. Loera filed the petition on September 28, 1999, within the 90-day period.

The city also attacks the petition on the ground that it was not verified when originally filed on September 28, 1999. Loera filed a verification on May 25, 2000, before the hearing on the petition. The city argues that, because of the tardy verification, the trial court could not entertain the petition. But the city does not cite any authority for that proposition. Accordingly, the issue is waived. (See *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.)

In addition, the city does not discuss how it might have been prejudiced by the lack of a verification when the petition was filed. Absent prejudice, there is no basis for reversal. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; Evid. Code, § 354; *Taylor v. Varga* (1995) 37 Cal.App.4th 750, 759, fn. 9; *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 574.)

D. Miscellaneous

The city focuses on certain allegations in the writ petition, arguing that they bar Loera's claim. For example, the writ petition, like the notice of termination, states that

the termination was effective April 21, 1999. Loera also alleged that "[o]n June 30, 1999 Chief Bernard Parks removed [me] from [my] position as a police officer in the Los Angeles Police Department effective April 21, 1999."

We find that the allegations of the petition do not preclude Loera from proving that he became a tenured officer before the notice of termination was delivered or transmitted to the personnel department. The effective date of Loera's termination, from the perspective of the police department, has no bearing on whether the personnel records unit received the notice of termination before Loera's probationary period ended.

Finally, in its reply brief, the city points out that Loera's notice of termination had a file-stamp date indicating receipt by the police commission on April 22, 1999. The city argues that notice to the police commission constituted notice to the BCSC. This contention has two flaws. First, the city does not cite any authority or the record to establish that the police commission is the legal equivalent of the BCSC, so we decline to consider the issue. (See *Interinsurance Exchange v. Collins, supra*, 30 Cal.App.4th at p. 1448; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Second, the contention was made for the first time in the reply brief. "'We do not entertain issues raised for the first time in a reply brief, in the absence of a showing of good cause why such issues were not raised in the opening brief.'" (*City of Costa Mesa v. Connell* (1999) 74 Cal.App.4th 188, 197.)

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

ORTEGA, J.

VOGEL (MIRIAM A.), J.